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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Brigido Cruz,

10 Plaintiff,

11 v.

12 Cuper Electric LLC, et al.,

13 Defendants.  
14

No. CV-23-01677-PHX-ROS

**ORDER**

15 Pending before the Court is Plaintiff's Motion for Attorneys' Fees and Costs  
16 ("Motion") (Doc. 32) seeking \$19,414.25 in fees and costs.

17 **BACKGROUND**

18 Plaintiff filed this suit for unpaid overtime wages under the Fair Labor Standards  
19 Act ("FLSA"), the Arizona Minimum Wage Act ("AMWA"), and the Arizona Wage Act  
20 ("AWA"). (Doc. 1). Defendants were properly served (Docs. 7-9) but failed to answer or  
21 otherwise participate in the action. The Court granted default judgment against all  
22 Defendants in the amount of \$11,634.00 and against Defendant Cuper Electric LLC in the  
23 amount of \$15,246.00 (Doc. 28).

24 **ATTORNEYS' FEES**

25 **I. ENTITLEMENT AND ELIGIBILITY TO FEES**

26 Plaintiff requests \$11,080.50 in attorneys' fees and \$881.70 in costs in accordance  
27 with Federal Rule of Civil Procedure 54, Local Rule of Civil Procedure 54.2, and  
28 29 U.S.C. § 216(b)—the FLSA's fee-shifting provision that "provides for attorney fees and

1 costs to a successful plaintiff.” *Haworth v. State of Nev.*, 56 F.3d 1048, 1050 n.1 (9th Cir.  
2 1995). The Court finds Plaintiff is eligible for, and entitled to, attorneys’ fees.

3 The FLSA requires courts to award reasonable attorneys’ fees to successful  
4 plaintiffs. 29 U.S.C. § 216(b); *see also Houser v. Matson*, 447 F.2d 860, 863 (9th Cir.  
5 1971) (“[The statute] provides that an award of attorney’s fee ‘shall’ be made to the  
6 successful plaintiff. The award of an attorney’s fee is mandatory.”). As the prevailing  
7 party in the present FLSA action, (Doc. 16), Plaintiff is entitled to attorneys’ fees.

8 Plaintiff argues he is entitled to attorney fees incurred in preparing the Motion for  
9 Attorneys’ Fees and Costs. Mot. at 4. Local Rule of Civil Procedure 54.2(c)(2) requires  
10 a plaintiff claiming “entitlement to fees for preparing the motion and memorandum for  
11 award of attorneys’ fees” and costs “must cite the applicable legal authority supporting”  
12 the request. Plaintiff cites *Gary v. Carbon Cycle Arizona LLC*, 398 F. Supp. 3d 468, 479  
13 (D. Ariz. 2019), as support for the proposition that a “party that is entitled to an award of  
14 attorneys’ fees is also entitled to compensation for time expended on an application for  
15 attorneys’ fees.” Mot. at 4. The Ninth Circuit has noted “federal courts, including our  
16 own, have uniformly held that time spent in establishing the entitlement to and amount of  
17 the fee is compensable.” *In re Nucorp Energy, Inc.*, 764 F.2d 655, 659-60 (9th Cir. 1985).  
18 And, more specifically, courts have awarded fees incurred in preparing fees motions in  
19 other FLSA cases within the District of Arizona. *See, e.g., Gary v. Carbon Cycle Arizona*,  
20 398 F. Supp. 3d 468.

21 The Court finds Plaintiff is entitled to recover fees, including those incurred in  
22 preparing the present Motion.

## 23 **II. REASONABLENESS OF REQUESTED AWARD**

24 While the FLSA mandates an award of attorneys’ fees to a successful plaintiff,  
25 29 U.S.C. § 216(b), “the amount of the award is within the discretion of the court,” *Houser*  
26 *v. Matson*, 447 F.2d 860, 863 (9th Cir. 1971). Courts “employ the ‘lodestar’ method to  
27 determine a reasonable attorney’s fees award.” *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th  
28 Cir. 2016) (citing *Fischer v. SJB–P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000)). Courts

1 calculate the lodestar figure by “multiplying the number of hours reasonably expended on  
2 a case by a reasonable hourly rate.” *Id.*

3 After calculating the lodestar figure, a Court may reduce or increase the award based  
4 on a variety of factors. Those factors include: (1) the time and labor required, (2) the  
5 novelty and difficulty of the legal questions involved, (3) the skill required to perform the  
6 legal service properly, (4) other employment precluded due to acceptance of the case, (5)  
7 the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed  
8 by the client or the circumstances, (8) the amount involved and the results obtained, (9) the  
9 experience, reputation, and ability of the attorneys, (10) the ‘undesirability’ of the case,  
10 (11) the nature and length of the professional relationship with the client, and (12) awards  
11 in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (“*Kerr*  
12 factors”).<sup>1</sup> The lodestar calculation normally subsumes some of these factors such that the  
13 Court need not consider them again after determining the lodestar. *See Gonzalez v. City of*  
14 *Maywood*, 729 F.3d 1196, 1209 (9th Cir. 2013) (identifying factors often considered when  
15 calculating lodestar).

### 16 **A. Hourly Rates**

17 The first question is whether Plaintiff’s asserted rate is reasonable. “A reasonable  
18 hourly rate is ordinarily the prevailing market rate in the relevant community.” *Sw. Fair*  
19 *Hous. Council v. WG Scottsdale LLC*, No. 19-00180, 2022 WL 16715613 at \*3 (D. Ariz.  
20 Nov. 4, 2022) (citing *Kelly*, 822 F.3d at 1099). And “the burden is on the fee applicant to  
21 produce satisfactory evidence—in addition to the attorney’s own affidavits—that the  
22 requested rates are in line with those prevailing in the community for similar services by  
23 lawyers of reasonably comparable skill, experience, and reputation.” *Blum v. Stenson*, 465  
24 U.S. 886, 895 n.11 (1984).

25 Plaintiff’s counsel, Clifford P. Bendau II, is a managing attorney at Bendau &  
26 Bendau PLLC with approximately 12 years’ experience as a litigator focusing exclusively

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28 <sup>1</sup> Local Rule 54.2 also lists factors the Court must address when determining the  
reasonableness of the requested award. These factors are largely duplicative of the *Kerr*  
factors.

1 on plaintiffs’ state and federal employment wage and hour litigation, primarily under the  
 2 FLSA. Mot. at 11. Plaintiff asserts a \$445 billing rate for Mr. Bendau. *Id.* at 4. Plaintiff  
 3 supports his proffered rate with an affidavit from Mr. Bendau outlining his experience and  
 4 stating the \$445 rate is reasonable, (Doc. 32-6) and a collection of rate determinations  
 5 regarding Mr. Bendau in other FLSA cases. (Doc. 32-2, 3, 4, 7, 8).

6 In his affidavit, Mr. Bendau claims he has practiced law for over ten years and has  
 7 litigated more than 600 employment-related lawsuits in that time. (Doc. 32-6 at 3). In a  
 8 2023 FLSA case within the District of Arizona, the court approved Mr. Bendau’s \$445 per  
 9 hour rate as reasonable. *Ekstrand v. Tru Realty LLC*, No. 23-cv-1416, Doc. 17 (D. Ariz.  
 10 Oct. 20, 2023). This Court recently followed suit, holding Mr. Bendau’s \$445 rate  
 11 reasonable. *Aguirre v. Custom Image Pros LLC*, No. 23-cv-0419, Doc. 20 (D. Ariz. May  
 12 15, 2024). According to Mr. Bendau, his \$445 rate is commensurate with his experience  
 13 level and is “well within the standard hourly rates charged by other law firms in the  
 14 Phoenix” area. (Doc. 32-6 at 4).

15 The Court finds the prevailing rates for FLSA cases in the District of Arizona and  
 16 Mr. Bendau’s experience support the requested hourly rate. The Court finds the \$445  
 17 hourly rate reasonable.

#### 18 **B. Hours Expended**

19 Under the lodestar method, the prevailing party is generally entitled to recover fees  
 20 for “every item of service which, at the time rendered, would have been undertaken by a  
 21 reasonable and prudent lawyer to advance or protect his client’s interest.” *Gary v. Carbon*  
 22 *Cycle Ariz. LLC*, 398 F. Supp. 3d 468, 486 (D. Ariz. 2019) (quoting *Twin City Sportservice*  
 23 *v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313 (9th Cir. 1982)). Courts may “exclude  
 24 from this initial fee calculation hours that were not reasonably expended.” *Hensley v.*  
 25 *Eckerhart*, 461 U.S. 424, 433-34 (1983) (internal quotations removed); *see also McKown*  
 26 *v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (“In determining the appropriate  
 27 number of hours to be included in a lodestar calculation, the district court should exclude  
 28 hours that are excessive, redundant, or otherwise unnecessary.”).

1 Plaintiff submits a log of time Mr. Bendau expended on the present case  
 2 (Doc. 32-5). The activity log states Mr. Bendau expended 24.9 hours in total. *Id.* Having  
 3 carefully considered the time and labor reasonably required for each task on Plaintiff's  
 4 activity log, the Court finds that each of the entries are reasonable.

### 5 **C. Lodestar Figure and Adjustment**

6 Having found Plaintiff's submitted rate and hours reasonable, the Court determines  
 7 the lodestar figure is \$11,080.50 (24.9 hours at a rate of \$445).

8 Despite a "strong assumption that the 'lodestar' method represents a reasonable  
 9 fee," *Corrales-Gonzalez v. Speed Auto Wholesalers LLC*, 2023 WL 3981139, at \*7 (D.  
 10 Ariz. June 13, 2023), the Court "has discretion to adjust the lodestar upward or downward"  
 11 based on the *Kerr* factors not subsumed in the lodestar calculation, *Stetson v. Grissom*, 821  
 12 F.3d 1157, 1166-67 (9th Cir. 2016). Courts must assess these factors and must articulate  
 13 "with sufficient clarity the manner in which it makes its determination." *Carter v. Caleb*  
 14 *Brett LLC*, 757 F.3d 866, 869 (9th Cir. 2014). The above lodestar analysis subsumes  
 15 several of these factors, including the time and labor required by counsel, skill required to  
 16 perform the legal service properly, customary fees in similar matters, and the experience  
 17 and reputation of counsel. The Court considers the remaining factors here and finds none  
 18 justify adjusting the lodestar figure.

### 19 **1. Preclusion of Other Employment**

20 Plaintiff avers Plaintiff's counsel "was not significantly precluded from other work  
 21 because of this representation." Mot. at 8. The Court finds this factor is neutral.

### 22 **2. Nature of Fee Arrangement**

23 Plaintiff asserts he retained counsel on a contingency fee. Mot. at 9. The Court  
 24 finds this factor supports awarding the full lodestar amount.

### 25 **3. Time Limitations**

26 Plaintiff submits there were no time limitations imposed in this case. Mot. at 11.  
 27 This factor is neutral.

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#### 1                                   **4. Results Obtained**

2                   “Where a plaintiff has obtained excellent results, his attorney should recover a fully  
3                   compensatory fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983). Plaintiff submits  
4                   counsel “has obtained excellent results” because he recovered “well in excess of the total  
5                   amount in unpaid wages that Defendants owed him.” Mot. at 11. This factor weighs in  
6                   favor of awarding the full lodestar amount.

#### 7                                   **5. Novelty and Difficulty of the Claims**

8                   Plaintiff submits the case involved a “straightforward claim that comes reasonably  
9                   often before this Court.” Mot. at 8. This factor is neutral.

#### 10                                  **6. Undesirability of the Case**

11                  Plaintiff argues this case was generally undesirable because it involved low  
12                  damages, a “speculative amount of available fees,” and the risk of taking on a matter and  
13                  expending costs without guarantee of recovery. Mot. at 12. While the Court agrees that  
14                  this factor supports Plaintiff’s award of fees, the Court finds this factor does not justify an  
15                  adjustment to the lodestar amount.

#### 16                                  **7. Nature of the Attorney-Client Relationship**

17                  Mr. Bendau has never represented Plaintiff before this case. Mot at 12. This factor  
18                  is neutral.

#### 19                                  **8. Awards in Similar Cases**

20                  Finally, the Court considers awards in similar cases. Plaintiff refers to the cases  
21                  cited for the reasonableness of Mr. Bendau’s hourly fee to demonstrate awards in similar  
22                  cases. Mot. at 13. In *Ekstrand v. Tru Realty LLC*, a court awarded an FLSA plaintiff  
23                  \$9,167.00 in attorneys’ fees after default judgment based on a \$445 hourly rate. No. 23-  
24                  cv-1416, Dkt. 17 (D. Ariz. Oct. 20, 2023). The Court finds this case is sufficiently similar  
25                  to the present case to weigh in favor of awarding the full lodestar amount.

#### 26                                  **9. Final Lodestar Adjustment**

27                  After consideration, The Court determines the *Kerr* factors do not justify an  
28                  adjustment to the lodestar amount.




1 plaintiff's counsel had entered into an agreement that promised 25% of the recovery to  
 2 another law firm in return for that firm engaging in collection efforts. *See Alvarez v.*  
 3 *Talaveras Renovations LLC*, No. 23-cv-02654, 2024 WL 1195462, at \*1–2 (D. Ariz. Mar.  
 4 20, 2024). But costs that Plaintiff has not yet incurred, and may never incur, still qualify  
 5 as “speculative.” For example, if Defendants learn of the judgment before Plaintiff’s  
 6 counsel engages the other law firm and Defendants immediately remit payment, Plaintiff’s  
 7 counsel will never incur the additional 25%. But perhaps more importantly, the very nature  
 8 of awarding collections costs on the front end is improper. A court can only award  
 9 “reasonable” costs and fees. *See* 29 U.S.C. § 216(b) (“The court in such action shall . . .  
 10 allow a *reasonable* attorney’s fee to be paid by the defendant.”) (emphasis added). Until  
 11 fees are incurred, the Court has no way to determine if they were reasonable. Using another  
 12 example, a judgment of \$20,000 would rise to \$25,000 under Plaintiff’s approach. The  
 13 other law firm might engage in collection efforts consisting of a single letter. If the  
 14 defendants then pay the entire judgment, a letter will have cost \$5,000, a patently  
 15 unreasonable amount. In the end, courts routinely award collections costs after they are  
 16 incurred. That is the wiser approach.

17 The Court finds an advance award of \$7,452.05 in anticipated collection costs  
 18 unreasonable. Plaintiff is free to seek collection costs or additional attorneys’ fees once  
 19 Plaintiff actually incurs them.

20 Accordingly,

21 **IT IS ORDERED** Plaintiff’s Motion for an Award of Attorneys’ Fees and Costs  
 22 (Doc. 32) is **GRANTED IN PART** and **DENIED IN PART**. The Court awards Plaintiff  
 23 \$11,080.50 in attorneys’ fees and \$881.70 in costs.

24 Dated this 13th day of November, 2024.

25   
 26 Honorable Roslyn O. Silver  
 27 Senior United States District Judge  
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